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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM [redacted] 1969

NO. 459

JAMES TERRELL KNIGHT,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Fifth Circuit

JOSEPH H. DAVIS
914 American Federal Building
Macon, Georgia

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

NO. .....

JAMES TERRELL KNIGHT,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals For The Fifth Circuit

Petitioner, James Terrell Knight, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the fifth Circuit entered in the above case on the 30th of June, 1969.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported to date, but is reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on the 30th of June, 1969. An extension was

granted by this Court until August 9, 1969, to file this petition. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTION PRESENTED

Is there a duty resting upon United States Probation Officers to promptly bring to the attention of the sentencing court an alleged violation of probation by one under their supervision and, if so, does a breach of that duty preclude the use of such alleged violation after an unreasonable length of time as a basis for revocation of probation.

STATEMENT OF THE CASE

Petitioner was jointly convicted with Elmer Samuel Chapman for possessing raw materials, namely sugar, with the intent to use such in the illicit whiskey business in violation of the Internal Revenue Laws. Six days later the Chief Probation Officer of the district in which petitioner was convicted filed a petition to revoke a sentence of probation theretofore imposed upon petitioner some six years previously and which was to commence upon his release from penitentiary confinement relating to a separate case. The grounds for revocation were as follows:

(1) Petitioner had associated with known liquor law violators (i.e. Elmer Chapman);

(2) On 10-14-66 (some two years prior) petitioner had admitted that a truck containing 5,264 five-gallon plastic jugs were his property;

(3) Petitioner had been convicted for possession of raw materials (sugar) on October 25, 1968.

It was uncontested that petitioner had been convicted of the charge as alleged but petitioner in that case contended that

the search and seizure were illegal and such question is raised in his application for the writ of certiorari simultaneously filed in this Court with this application. The alleged association with Elmer Chapman is also involved in said other application for the writ of certiorari as the Elmer Chapman mentioned in the petition to revoke is one and the same as is jointly questioning said search and seizure in said related case filed in this Court. It was further shown during the probation revocation that petitioner was on conditional release from the United State Penitentiary at the time he admitted to possession of the said truck and said jugs and that a report of such possession had been furnished to the United States Pardon and Parole authorities as well as to the United States Attorney and also to a Probation Officer. The place of possession of said jugs was located within the Macon Division of the Middle District of Georgia, the district in which petitioner was initially sentenced to said probation.

It was also shown during said hearing that in September, 1967, a known major liquor violator was seen at petitioner's place of business at night in the presence of one who was known to have driven the truck containing the said jugs from the State of Maryland to the premises on which petitioner resided in a trailer adjacent to his mother.

The Court stated it found sufficient facts independent of the said truck and sugar as sufficient basis for revoking petitioner's probation. (R-35)

REASON FOR GRANTING THE WRIT

Should the search and seizure in the raw materials case be held unlawful then such ground, of necessity, could not be considered as a basis for revoking probation. Petitioner concedes that if such search and seizure is valid and the conviction is sustained, then reason exists for petitioner's probation to have been revoked.

However, if such conviction is reversed, then under the trial judge's findings of fact independently of said facts relating to the conviction, the use of the admission by petitioner of the said jugs being his property and its basis for revocation of probation becomes vitally important. We think it unquestionably appears from the record herein that the investigating officials of the United States as well as the prosecuting officials and the probation officials had knowledge of such for a period of time that can be reasonably shown to be from eighteen months to two years. Yet the record is clear that no action was taken during that period of time to either prosecute or to revoke the probation sentence imposed upon petitioner. Nor was any action taken insofar as his conditional release from Federal confinement was concerned. No adequate explanation appears in the record as to why no action was taken. The sentencing judge did make reference to same (R-33) but the inference is that the sentencing judge was not aware of the previous episode concerning the said jugs nor the reasons why no action was taken thereon.

Petitioner respectfully submits that the duty rests upon a probation officer to report any instances of conduct on the part of one under his supervision as would be in violation of the terms of probation. Indeed, the statutory provision as found in 18 USCA 3655 provides in substance that a probation officer shall keep informed concerning the conduct and condition of a probationer under his supervision and shall report thereon to the Court placing such person on probation.

It would appear that petitioner is seeking a determination of something that would be adverse to his interest. However, the failure of the probation officer to so take affirmative action insofar as said jugs and truck were concerned between the period October 14, 1966 and November 1, 1968, would appear to be a violation of the statutory duty imposed upon him, the breach of which would now preclude the use by such supervising pro-

bation official of such in a cumulative manner to institute revocation proceedings against petitioner. It would appear that the duty rested upon the probation official to so take action if he deemed it in violation of the terms of probation and absent such action, or his satisfactory explanation of why no action was taken, to be estopped from the use of such information at this time. The delay was therefore prejudicial to petitioner as it permitted the hearing court to have the cumulative effect presented, when standing alone, it might have been insufficient.

Petitioner concedes that probably in no area in the administration of criminal justice is more discretion vested in a sentencing judge than when the matter of a probation sentence is involved. However, upon an abuse of that discretion, the courts uniformly hold that the accused is entitled to relief.

Petitioner further concedes that the question here raised was not argued on his appeal to the United States Court of Appeals for the Fifth Circuit from the judgment revoking his probation. However, he here urges that the record bears out the factual statements herein made of knowledge on the part of the officials concerned of his activities with respect to such jugs during the period in question.

Petitioner does not urge that the time factor alone would justify the granting of the writ. The event did fall within the period of his probation and presumably within the statute of limitations. It is the time factor plus knowledge thereof on the part of the officials which petitioner relies upon and the non-action of the officials during that time. One can only speculate as to what might have happened but the fact is that the orderly and due administration of criminal justice would not appear to have been served by the actions herein complained of and consequently, that breach of statutory duty having occurred, such event should not now be used as an independent basis on which petitioner's probation was revoked.

CONCLUSION

For the foregoing reasons and in the interest of the fair administration of criminal justice at the trial level and particularly for the sake of promulgating guidelines for the use of personnel in the administration of the laws relating to probation and its revocation and to insure uniformity, the petition should be granted and the judgment below vacated, or in the alternative vacated and remanded with instructions as to the use of evidence of the event occurring in October, 1966, as a basis for revocation.

Respectfully submitted,

Joseph H. Davis
914 American Federal Building
Macon, Georgia 31201

CERTIFICATE OF SERVICE

I, Joseph H. Davis, do certify that I have on the date shown below served the within petition upon the United States Attorney, Middle District of Georgia, Macon Division, Macon, Georgia, Counsel of Record for adverse party, by mailing same to him at his post office address, Macon, Georgia, and also by air mail upon the Solicitor General, Department of Justice, Washington, D. C. 20530, with first class postage prepaid in each instance.

This 8 day of August, 1969.

Joseph H. Davis

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27001

Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES TERRELL KNIGHT,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

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(June 30, 1969)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: This is an appeal from a revocation of probation. From the facts disclosed by the record we find the appeal to be without merit.[1] The revocation proceedings were

1. Pursuant to new Rule 18 of the Rules of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the Clerk to place the case on the Summary Calendar and to notify the parties in writing. See Murphy v. Houma Well Service, 5 Cir., 1969, ____ F. 2d ___, Part I (No. 26902, slip opinion dated March 11, 1969).

brought following the conviction of appellant and another for a misdemeanor in connection with nontax-paid distilled spirits.[2] Revocation of probation is a matter of judicial discretion. *Seymore v. Beto*, 5 Cir., 1967, 383 F. 2d 384. The only issue, therefore, is whether or not the trial court abused this discretion. *Broadus v. United States*, 5 Cir., 1963, 317 F. 2d 212, 213. We find no such abuse.

AFFIRMED.

2. See the opinion rendered this day in the matter of Elmer S. Chapman and James T. Knight v. United States of America, 5 Cir., 1969, ____ F. 2d ____ [Nos. 26992 and 27002] affirming the conviction of appellant and his codefendant.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 27001

D. C. Docket No. CR. 7901

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES TERRELL KNIGHT,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 30, 1969

Issued as Mandate:

SUPREME COURT, U. S.

AUG 11 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM [redacted] 1969

No. 460

ELMER SAMUEL CHAPMAN
AND
JAMES TERRELL KNIGHT

Petitioners

V.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

JOSEPH H. DAVIS
914 American Federal Building
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No.....

ELMER SAMUEL CHAPMAN
AND
JAMES TERRELL KNIGHT

Petitioners

V.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals For the Fifth Circuit

Petitioners, Elmer Samuel Chapman and James Terrell Knight, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on the 30th of June, 1969.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported to date, but is reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on the 30th of June, 1969. An extension was grant-

ed by this Court until August 9, 1969, to file this petition. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTION PRESENTED

Is a warrantless arrest for the misdemeanor offense of possessing property intended for use in violating the Internal Revenue laws relating to illicit whiskey valid when the property so possessed is not contraband per se nor its mere possession prohibited by law.

STATEMENT OF CASE

Petitioners were convicted for possessing sugar intended for use in the illicit liquor business. There was no arrest or search warrant and their motion to suppress was denied. For purposes of this petition it is conceded the evidence showed they were observed in the afternoon loading at two small retail stores a large quantity of sugar on a truck and thereafter, they parted company and one of them drove the truck some 15 miles on public roads to Ft. Valley, Georgia where he was arrested on the outskirts of town. Each was known to the officers as having reputations for handling "raw materials" insofar as illicit liquor was concerned.

REASON FOR GRANTING THE WRIT

Petitioners here seek and ask this Court to limit the rationale and holding of those cases such as *Carroll v. United States*, 267 U.S. 132, 45 SCT. 280 (1925) which permit a warrantless arrest upon probable cause to those instances wherein the offending property is contraband per se and not such a type property as is readily available upon the open market.

The property here involved was plain, household Dixie Crystal sugar. For the crime to be complete insofar as its possession for unlawful purposes is concerned, the requisite criminal intent to use it in violation of the Internal Revenue Laws relating to

illicit liquor must be present beyond a reasonable doubt, otherwise, the crime is not complete and therefore, not committed in the presence of the arresting officer. An arrest warrant was therefore necessary.

As we read *Carroll*, it was decided during the prohibition era when liquor per se was unlawful and the crucial need was to prohibit generally its manufacture, possession, etc. Therefore, when the above reasoning as to drawing a distinction between arrest for felonies and those for misdemeanors to the extent of requiring the arresting officer to "sense" a violation in his presence, Mr. Justice Taft did "not think such a nice distinction is applicable in the present case." Under the law there involved, the primary concern was the seizure and forfeiture of the contraband liquor and it was the property and not so much the owner thereof that offended. Here, sugar per se is not so offensive such as its possession is prohibited as a matter of law per se. Therefore, the arresting officer, under the theory of *Carroll*, is substituted as the trier of facts on the scene. Were it contraband involved, the case would be different and petitioners so concede.

The same is true under the holding of *Brinegar v. United States*, 338 U.S. 160, 69 SCT. 1302 (1949) which concerned the misdemeanor statute of transporting liquor into a prohibited area. So it is not every misdemeanor that should come without the reach of *Carroll* and *Brinegar*, but only those in which the property alleged to be the offender is not in and of itself contraband. Sugar is only forfeitable when possessed with the requisite intent. Standing alone, it is not. Therein lies its difference from those items of contraband such as untax paid spirits, goods on which custom duties have not been paid, fruits of a crime, stolen property, etc.

We respectfully differ therefore from the learned court below and submit their reliance on the cases cited is misplaced when one examines closely the offending properties therein involved.

If in fact such would render law enforcement difficult in the so-called raw materials area as to the Internal Revenue Laws relating to liquor, such is no more than justice requires under the circumstances. We do not say that no arrests for such can be made but only arrests with a valid warrant and are seeking only to confine that to instances when the property involved is not contraband as such. If the property is the thing sought, then there is ample statutory authority for the offending property to be seized under a proper monition and attachment and a libel of information filed to condemn such. Petitioners here simply urge the invalidity of their arrests and attack the manner of seizure herein as not being lawfully incident to a valid arrest.

Petitioners concede probable cause as being a valid basis in other instances for an arrest and seizure and agree with the various statements as to what that term means. In this case, however, in view of the statutory distinction between the agent's power of arrest for a felony and his power of arrest for a misdemeanor, the distinction must be given meaning. See 26 USCA 7608 quoted in the opinion found in the appendix hereto.

Therefore, was this crime committed in the arresting officer's presence? As stated, it is unlike those cases where the offending property is contraband per se and reasonably believed to be in the possession of the accused. Here it was wide open daylight, literally on the edge of a city on a public street and no where near that remote part of the country "infested by smugglers" as Mr. Justice Taft quoted in *Carroll* when he noted the geographical layout of the operations there dealt with. Had the driver here been proceeding down a wooded road in a sparsely populated area towards a known creek or river with 6,480 pounds of sugar, the case might well have been different. But suspicion only existed at the time of arrest. That is not enough as this Court has held.

We respectfully submit this Court should restrict warrantless arrests insofar as misdemeanors are concerned to those cases involving property that is contraband per se. Otherwise a warrant should be required. Such is not only for the protection of the innocent but indeed, for those who in fact in the past may have been or have been suspect. At any given moment, they must have the same constitutional safeguards.

CONCLUSION

The proper administration of criminal justice and equal protection to the innocent as well as the suspect alike require that a valid arrest warrant be issued by a magistrate when one is suspected of unlawfully possessing property intending to use same in violation of law when such property is in of itself not contraband or prohibited per se.

Respectfully submitted,
Joseph H. Davis
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Joseph H. Davis, do certify that I have on the date shown below served the within petition upon the United States Attorney, Middle District of Georgia, Macon Division, Macon, Georgia, Counsel of Record for adverse party, by mailing same to him at his post office address, United States Courthouse, Macon, Ga., and also by airmail upon the Solicitor General, Department of Justice, Washington, D. C. 20530, with first class postage prepaid in each instance.

This 9th day of August, 1969.

Joseph H. Davis

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 26992 and 27002

Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

versus

ELMER SAMUEL CHAPMAN

Defendant-Appellant

UNITED STATES OF AMERICA

Plaintiff-Appellee

versus

JAMES TERRELL KNIGHT

Defendant-Appellant

Appeals from the United States District Court for the Middle District of Georgia

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(June 30, 1969)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

AINSWORTH, Circuit Judge: Appellants were convicted by a jury of aiding and abetting each other in possessing certain property (6,480 pounds of sugar and a Dodge truck), knowing it was intended to be used in the nontax-paid distilled spirits business, a misdemeanor under 26 U.S.C. § 5686(a).[1] Both appellants filed motions to suppress evidence pertinent to the seizure of the property by the Federal Revenue Agent who, without a warrant, stopped the truck which appellant Chapman was driving, arrested Chapman, and seized the truck and its load of sugar. These motions were denied.[2]

Appellants attack their convictions on three grounds: (1) insufficiency of the evidence; (2) illegality of the arrest and subsequent search and seizure and consequent failure of the court to suppress the evidence; and (3) introduction of evidence by the Government, over objection, of the purchase by appellant Knight of large amounts sugar.

The following facts led to the arrest, seizure and subsequent convictions.

On June 20, 1968, Federal Revenue Agents Brown and Rogers were observing Highway 41 Grocery in the vicinity of Perry,

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[1] 26 U.S.C. § 5686(a):

> "It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both."

[2] Pursuant to new Rule 18 of the Rule of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the Clerk to place the case on the Summary Calendar and to notify the parties in writing. See Murphy v. Houma Well Service, 5 Cir., 1969, _____ F. 2d _____, Part I [No. 26902, slip opinion dated March 11, 1969].

See the opinion rendered this day in the related matter of United States of America v. James Terrell Knight, 5 Cir., 1969, _____ F. 2d _____ [No. 27001] affirming the revocation of probation of appellant Knight.

Georgia. At about 2 p.m., both agents saw appellants Knight and Chapman drive up to the grocery in separate vehicles—Knight, in a Buick automobile, and Chapman, in an empty Dodge truck. The agents knew both appellants by reputation as being connected with the illicit liquor business. They saw both appellants go into the grocery and after a few minutes come out. Appellants then began loading the truck with sugar.[3] Appellants left in the same two vehicles and proceeded to Moses Grocery approximately 300 yards away where they loaded more sugar onto the truck, after which they left in convoy fashion, with Agent Brown following closely behind. When the two suspects separated at an intersection Brown continued to follow Chapman, the driver of the truck, as far as the vicinity of Fort Valley, Georgia, a distance of about 16 miles, when Brown stopped him and placed him under arrest.

The arresting officer, Brown, could clearly see the sugar through a crack in the back of the truck from the time of the loading to the time of arrest. He had known both appellants by sight for approximately three years. He had previously arrested Chapman for the same violation. He knew that both men had previously violated the Federal Internal Revenue Laws, and that Knight had the reputation of being a "raw materials diverter on a big scale."[4] He also knew that Knight managed a small retail store which was registered in his mother's name. However, he observed that sugar-laden truck was headed in the direction opposite to this store, thus dispelling

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[3]Although Agent Rogers' position did not allow him to see the actual sugar being loaded, he observed later that the previously empty truck was heavily laden, and still later at the Sheriff's Office he counted 6,480 pounds of sugar in the back of the same truck. Agent Brown's vantage point enabled him to see clearly the sugar being placed into the truck.

[4]Both appellants have been before this court in related matters. See Knight v. United States, 1962, 310 F. 2d 305; Knight v. United States, 1962, 297 F. 2d 675; Chapman v. United States; 196, 289 F. 2d 539; Chapman v. United States, 1959, 272 F. 2d 70, rehearing denied, 1960, 273 F. 2d 412.

any possible doubt that the sugar was intended for resale at Knight's retail store. Brown also knew that the "moonshine whiskey" traffic flourished in that general vicinity of the state.

In addition to the testimony of the two Revenue Agents, including Brown's eyewitness account of the actual sugar loading, the evidence also showed that Knight had recently purchased large amounts of sugar: approximately 311,720 pounds during 1967 and 46,110 pounds for the first six months of 1968. During the latter part of 1967 the Federal Government made demand on grocers in connection with sales of sugar, requiring them to report quantities sold in amounts over 100 pounds. There was no plausible reason why appellants should procure, and then themselves load, sugar from two stores in Perry and haul it 16 miles to Fort Valley. Of course, the purpose for taking the sugar to Fort Valley and not in the opposite direction to Knight's store was without reasonable explanation.

Appellants argue that before an arrest without a warrant can be made for a misdemeanor, as distinguished from a felony, the offense must be committed in the presence of the arresting officer. They contend that the offense consists of two elements—possession and intent to use the material in the illicit liquor business. Further, they argue, it was impossible to ascertain under the circumstances the illicit intent from the mere possession of the sugar, a commodity not per se illegal and, therefore, the arrest was invalid.

The statute authorizing the arrest, 26 U.S.C. § 7608, reads in pertinent part:

> "(a) Any investigator, agent, or other internal revenue officer . . . may—
>
> . . . .
>
> (3) . . . make arrests without warrant for any offense against the United States committed in his presence, or

> for any felony cognizable under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony. . . . "

Undoubtedly, the statute sets out different criteria for misdemeanor arrests as compared with felony arrests. It requires that the misdemeanor be committed in the presence of the arresting officer for a warrantless arrest therefor to be valid.[5] It is also necessary that both possession and illicit intent be present in order to constitute a violation under 26 U.S.C. § 5686(a).[6] We have no hesitancy, however, in concluding from the record that the crime was in fact committed in the presence of Agent Brown. Possession was proved by his eyewitness testimony and corroborated by Agent Rogers. There was also substantial evidence to prove the element of illicit intent.

Whether or not a warrantless arrest is lawful depends upon whether the arresting officer had probable cause to believe that an offense was being committed in his presence. In *Brinegar v. United States*, 338 U. S. 160, 174, 175, 69 S. Ct. 1302, 1310 (1949), a case involving a conviction for a misdemeanor under the Liquor Enforcement Act, 18 U.S.C. § 1262, the Supreme Court, in discussing the standards for determining probable cause for arrest, as well as for search and seizure, said:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not

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[5] "The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdeameanor if committed in his presence. Kurtz v. Moffitt, 115 U. S. 487, 6 S. Ct. 148, 29 L. Ed. 458; John Bad Elk v. United States, 177 U. S. 529, 20 S. Ct. 729, 44 L. Ed. 874." Carroll v. United States, 267 U. S. 132, 156, 157, 45 S. Ct. 280, 286 (1925).

[6] Adams v .United States, 10 Cir., 1967, 375 F. 2d 635, 638; United States v. Skinner, 2 Cir., 1959, 272 F. 2d 607 608.

technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

" . . . Probable cause exists where 'the facts and circumstances within their [the officers] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the believe that' an offense has been or is being committed."

See also *Henderson v. United States*, 5 Cir., 1968, 405 F. 2d 874, 875, cert. denied, ____ U. S. ____ (1969); *Ward v. United States of America*, 5 Cir., 1961, 288 F. 2d 620, 621.

In *Beck v. State of Ohio*, 379 U. S. 89, 96, 85 S. Ct. 223, 228 (1964), the Supreme Court, citing the landmark decision of *Carroll v. United States*, supra, which involved a misdemeanor, said, "When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed. *Carroll v. United States*, 267 U. S. 132, 162, 45 S. Ct. 280, 288, 69 L. Ed. 543."

Having found that the arrest was lawful, it follows that the seizure of the sugar and truck as an incident to that arrest was lawful as well as the admission of evidence pertinent thereto. *Beck v. State of Ohio*, 379 U. S. 89, 91, 85 S. Ct. 223, 225 (1964); *United States v. Rabinowitz*, 339 U. S. 56, 65, 70 S. Ct. 430, 435 (1950). The reasonable cause which the seizing officer had for believing that the contents of the vehicle offended against the law was an independent ground for seizure, *Carroll v. United States*, 267 U. S. at 158, 159, 45 S. Ct. at 287, and there was abundant evidence that Agent Brown, from his past experience with appellants and from the actual witnessing of

the loading of the truck, had reasonable cause under the circumstances.

There was substantial evidence to justify the denial by the court of the motion to suppress and to support the verdict. Consequently, taking the view most favorable to the Government, we may not upset the verdict.[7]

If we were to follow appellants' theory to its logical conclusion, there could never be a warrantless arrest for the possession of materials intended for use in violation of the Internal Revenue Laws, inasmuch as "intent," being a subjective quality, could never be observed by the senses.[8]

The construction which appellants urge would also render inoperative the Internal Revenue Laws pertinent to seizure and forfeiture of the prohibited raw materials and the conveyances for the transportation of same.[9]

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[7]Glasser v. United States 315 U. S. 60, 80, 62 S. Ct. 457, 469 (1942); Lacaze v. United States, 5 Cir., 1968, 391 F. 2d 516, 519; Gorman v. United States, 5 Cir., 1963, 328 F. 2d 51, 52; Walker v. United States, 5 Cir., 1962, 301 F. 2d 94, 95; Ah Ming Cheng v. United States 5 Cir., 1962, 300 F. 2d 202, 203.

[8]A similar argument was urged and rejected in Carroll v. United States, 267 U. S. 132, 157, 45 S. Ct. 280, 286, 287 (1925).

[9]26 U.S.C. § 7321 provides that

> "Any property subject to forfeiture to the United States under any provision of this title may be seized by the Secretary or his delegate."

26 U.S.C. § 7301 provides in pertinent part as follows:

> "(b). All property found in the possession of any person intending to manufacture the same into property of a kind subject to tax for the purpose of selling such taxable property in fraud of the internal revenue laws, or with design to evade the payment of such tax may also be seized, and shall be forfeited to the United States.
>
> "(e). Any property . . . used to transport or for the deposit or concealment of property described in subsection (a) or (b), or any property used to transport or for the deposit or concealment of property which is intended to be used in the making or packaging of property described in subsection (a), may also be seized, and shall be forfeited to the United States."

We say again, as this court said in *Chapman v. United States*, 5 Cir., 1961, 289 F. 2d 539, 542, a case involving one of the same appellants for the identical violation:

> "[T]he information which the officers had justified their belief that the sugar was intended for use in violating the provisions of the internal revenue laws. The arrest and seizure were legal, and the motion to suppress was properly overruled."

Appellants contention that the court erred in admitting evidence pertinent to the former purchases of large amounts of sugar by defendant Knight is without merit. In *Gilstrap v. United States*, 5 Cir., 1968, 389 F. 2d 6, 9, in recognizing an exception to the general rules of exclusion, we said:

> "[W]here intent and knowledge are essential elements of the crime for which the defendant is being tried, evidence of other transactions, even though criminal in nature, is admissible to prove the necessary criminal intent or guilty knowledge, if the transactions are so connected with the offense charged that they serve to show a general pattern."[10]

The evidence was admissible for the purposes of proving a consistent and recurrent pattern of conduct relevant to the issue of intent.

AFFIRMED.

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[10]Nye & Nissen v. United States, 336 U. S. 613, 618, 69 S. Ct. 766, 769 (1949). See also Barnett v. United States, 5 Cir., 1967, 384 F. 2d 848, 862; Brumley v. United States, 5 Cir., 1967, 379 F. 2d 327; Pardo v. United States, 5 Cir., 1966, 369 F. 2d 922 924, 925; 2 Wigmore, *Evidence* §§ 302-304 (3d ed. 1940); 32 C.J.S. *Evidence* §§ 579-580.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26992

D. C. Docket No. CR. 8629

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ELMER SAMUEL CHAPMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

June 30, 1969

Issued as Mandate:

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 27002

D. C. Docket No. CR. 8629

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

JAMES TERRELL KNIGHT,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

June 30, 1969

Issued as Mandate:

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 460

ELMER SAMUEL CHAPMAN AND JAMES TERRELL KNIGHT, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 459

JAMES TERRELL KNIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Both petitioners in No. 460 were convicted of possessing sugar and a Dodge truck intended for use in violation of the Internal Revenue laws relating to

distilled spirits, a misdemeanor under 26 U.S.C. 5686(a). Petitioners do not here deny that the verdict against them was amply supported, but attack only their arrest and the concomitant seizure of the truck and sugar.

The circumstances in which petitioners were arrested and the sugar seized are set forth in some detail in the opinion of the court of appeals. Petitioners argue that since sugar is not contraband, the officers ipso facto could not see the misdemeanor being committed in their presence so as to have authority to arrest under 26 U.S.C. 7608, and that therefore the search and seizure of the sugar and truck cannot be justified as incident to arrest. As the court of appeals held, however, the officers not only saw petitioners in possession of the sugar, they saw them have possession under circumstances which gave them probable cause to believe that the sugar was intended for an unlawful purpose. Any more stringent requirement as to the agents' knowledge of petitioners' subjective intent would in effect prohibit any arrest without a warrant for violation of 26 U.S.C. 5686(a) and related statutes. Moreover, irrespective of the right to arrest the individuals, the agents had authority to seize the truck and sugar on probable cause to believe that they were subject to forfeiture under 26 U.S.C. 7301 and 7321. *Grogan* v. *United States*, 261 F.2d 86 (C.A. 5), certiorari denied, 359 U.S. 944.

In No. 459, petitioner Knight attacks the revocation of probation previously imposed for another offense. He admits that if the conviction involved in

No. 460 is sustained, there was reason to revoke probation (Pet. 3). He argues only that, if that conviction is reversed, the revocation of probation would be improper since the additional evidence supporting revocation, which was unrelated to the sugar incident (Pet. 3), had been known to probation officers for two years without their taking any action. Since petitioner's conviction in No. 460 has been, in our view, properly sustained by the court below, the petition in No. 459 raises a theoretical question. In any event, the other evidence amply supported revocation without regard to the conviction in No. 460, and it was plainly recent enough to be relevant.

Both petitions for writs of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER, 1969.

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